

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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to: Area Counsel (Natural Resources & Construction)
(Large & Mid-Size Business)

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subject: Nuclear Decommissioning Costs under § 468A and Specified Liability Loss under § 172(f)(1)(B)(i)(II)

This memorandum responds to your request for assistance on the deduction for nuclear decommissioning costs under § 468A of the Internal Revenue Code (Code) and the specified liability loss provision under § 172(f)(1)(B)(i)(II) for these costs.

ISSUES

1. May a taxpayer that establishes a Qualified Nuclear Decommissioning Fund (Fund) under § 468A deduct nuclear decommissioning costs if paid with assets from sources other than Fund assets if the Fund has sufficient assets available to pay the amount.
2. If a taxpayer may deduct nuclear decommissioning costs paid with assets from sources other than Fund assets, is the deductible amount a "specified liability loss" under § 172(f)(1)(B)(i)(II).

CONCLUSIONS

1. A taxpayer that has established a Fund under § 468A may deduct nuclear decommissioning costs paid with assets from sources other than the Fund when economic performance, within the meaning of § 461(h)(2), occurs even though the Fund has sufficient assets available to pay the amount.

2. A deductible nuclear decommissioning cost paid with assets other than Fund assets is a “specified liability loss” under § 172(f)(1)(B)(i)(II).

LAW AND ANALYSIS

Issue 1

Section 468A(a) was added to the Code in 1984 by Deficit Reduction Act of 1984, Pub. L. No. 98-369. Section 468A(a) allows owners/operators of nuclear power plants to currently deduct contributions to a Fund. Section 468A(b) limits the amount of contributions that may be paid into a Fund to the “ruling amount.” See also § 1.468A-3T of the Temporary Income Tax Regulations. Under § 468A(d)(2), the “ruling amount” is the amount necessary to allow the Fund to pay the costs of decommissioning the nuclear power plant for which the Fund is maintained. Section 468A is contained in Subpart C of Part II of Subchapter E of the Code. This subpart contains rules for determining the taxable year in which deductions, otherwise allowable, may be taken. Section 468A(a), which allows a current deduction for an amount contributed to a Fund to pay for the future decommissioning of a nuclear power plant, is an exception to the normal rule in § 461(h)(1) that requires economic performance before an amount is deductible.

In addition to the current deduction under § 468A(a) for contributions to a Fund, § 468A(c)(2) recognizes that an owner/operator may deduct otherwise deductible nuclear decommissioning costs for which economic performance (within the meaning of § 461(h)) occurs during a taxable year. For rules relating to the time when economic performance occurs, see § 461(h)(2) of the Code and § 1.461-4 of the Income Tax Regulations.

Section 1.468A-1T(b)(6) defines “nuclear decommissioning costs” as all otherwise deductible expenses to be incurred in connection with the entombment, decontamination, dismantlement, removal, and disposal of the structures, systems, and components of a nuclear power plant. Thus, § 468A and the temporary regulations do not provide the authority for the deduction of nuclear decommissioning costs that are not otherwise deductible under the Code.

There is nothing in § 468A(c)(2) that limits the deduction for nuclear decommissioning costs to liabilities that are satisfied with Fund assets. Section 468A(e)(4) provides, “[t]he Fund shall be used exclusively for satisfying, in whole or in part, any liability of any person contributing to the Fund for the decommissioning of a nuclear power plant (or unit thereof).” While § 468A(e)(4) makes it clear that a Fund may be used only for a prescribed purpose, it does not require that Fund assets must be the sole source of any amounts paid for decommissioning costs. Indeed, § 468A(c)(2) expressly permits a deduction, otherwise deductible under the Code (in addition to contributions to a Fund), for nuclear decommissioning costs for which economic performance occurs. Accordingly, a taxpayer may deduct, to the extent otherwise allowable under the Code,

nuclear decommissioning costs in the year in which economic performance occurs, whether the source of the payment is Fund assets or other assets, even though the Fund has sufficient assets to satisfy the liability.

Issue 2

Section 172(a) allows as a deduction for a taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to the year, plus (2) the net operating loss carrybacks to the year.

Under § 172(c), a net operating loss is defined generally as the excess of deductions permitted by Chapter 1 over the gross income.

Section 172(b)(1)(C) provides that in the case of a taxpayer that has a specified liability loss (as defined in § 172(f)) for a taxable year, that specified liability loss is a net operating loss carryback to each of the 10 taxable years preceding the year of the loss. Section 172(f)(3) provides that for purposes of § 172(b)(1)(C), “specified liability losses” arising from the decommissioning of a nuclear power plant (or unit thereof) may be carried back to each of the taxable years during the period beginning with the the year the plant (or unit) was placed in service and ending with the taxable year preceding the loss year.

Section 172(f)(1)(B)(i)(II) provides that a “specified liability loss” includes an amount allowed as deduction under Chapter 1 (other than §§ 468(a)(1) or 468A(a)) which is in satisfaction of a liability under a Federal or State law requiring the decommissioning of a nuclear power plant (or any unit thereof). Section 172(f)(2) provides that a specified liability loss for a taxable year may not be greater than the amount of the net operating loss for that year.

Amounts contributed to a Fund that are deductible under § 468A(a) are excluded from the definition of a “specified liability loss” under § 172(f)(1)(B)(i). However, other decommissioning costs that are currently deductible are a specified liability loss under § 172(f)(1)(B)(i)(II). As concluded above, the allowable deduction for decommissioning costs is not limited to amounts paid with Fund assets. Accordingly, a decommissioning cost that is currently deductible under the Code (other than under § 468A(a)) is a specified liability loss under § 172(f)(1)(B)(i)(II) whether the amount is paid with Fund assets or other assets.

Please call Marnette Myers or me at (202) 622-4920, if you have any further questions.